

APPEAL NO. 162038  
FILED NOVEMBER 30, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 25, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter, March 9 through June 7, 2016; and (2) the respondent (carrier) did not waive its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a benefit review conference (BRC). We note that the hearing officer's decision contains a typographical error regarding the address of the carrier's registered agent for service of process.

The claimant appealed the hearing officer's determination that he is not entitled to third quarter SIBs, contending the evidence does not support that determination. The carrier responded, urging affirmance. The hearing officer's determination that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a BRC was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed as reformed.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), with a 15% or greater impairment rating; the claimant has not commuted any portion of the impairment income benefits; the qualifying period for the third quarter of SIBs began on November 26, 2015, and ended on February 24, 2016; the minimum number of job applications or work search contacts pursuant to 28 TEX. ADMIN. CODE § 130.102(f) (Rule 130.102(f)) required for the third quarter qualifying period is three per week, for (County); and the carrier did not waive its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a BRC.

The record established that the claimant was injured while working as a grain supervisor when his foot was caught in an auger. The record established that the injury resulted in an above-knee amputation of the claimant's left leg.

The hearing officer found in Finding of Fact No. 3.E. that:

[The] [c]laimant made only two job search efforts during the ninth week of the qualifying period, which began on Thursday, January 28, 2016, and ended on Wednesday, February 3, 2016.

However, given that the first week of the third quarter qualifying period began on November 26, 2015, and ended on December 2, 2015, the ninth week of the third quarter qualifying period actually began on Thursday, January 21, 2016, and ended on Wednesday, January 27, 2016. We reform Finding of Fact No. 3.E. to state the ninth week of the third qualifying period began on Thursday, January 21, 2016, and ended on Wednesday, January 27, 2016, to reflect the correct dates for the ninth week of the third quarter qualifying period.

The evidence established that the claimant made only two job searches during January 21 through January 27, 2016, which are the correct dates for the ninth week of the third quarter qualifying period. The hearing officer's finding that the claimant made only two job search efforts during the ninth week of the qualifying period, as reformed above, is supported by sufficient evidence.

Rule 130.102(d)(1) provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

- (A) has returned to work in a position which is commensurate with the injured employee's ability to work;
- (B) has actively participated in a vocational rehabilitation program [VRP] as defined in [Rule] 130.101 of this title (relating to [d]efinitions);
- (C) has actively participated in work search efforts conducted through the Texas Workforce Commission (TWC);
- (D) has performed active work search efforts documented by job applications; or
- (E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

Rule 130.102 provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the specified work search requirements each week during the entire qualifying period. The preamble to Rule 130.102 stated "[s]ubsection(d)(1) is also amended to add 'each week' before

‘during’ and ‘entire’ before ‘qualifying period’ to clarify that the injured employee’s work search efforts were to continue each week during the entire qualifying period.” (34 Tex. Reg. 2140, 2009).

We note that the evidence established the claimant worked from November 26, 2015, until he was laid off on January 4, 2016, at which point he began making work search contacts. The hearing officer found that the claimant was unemployed for at least a part of the qualifying period, and that the claimant did not demonstrate an active effort to obtain employment each week during the entire qualifying period. The hearing officer made no specific finding of fact regarding the dates of the weeks the claimant worked or whether the claimant returned to work in a position which is commensurate with the claimant’s ability to work. We note also that the claimant testified he has signed up with Department of Assistive and Rehabilitative Services (DARS); however, the claimant did not testify that he has a VRP, also known as an Individualized Plan for Employment (IPE), nor was an IPE for the claimant in evidence. The hearing officer’s decision regarding third quarter SIBs does not specifically address each week of the third quarter qualifying period. However, given Finding of Fact No. 3.E., as reformed, that the claimant made only two job search efforts during the ninth week of the third quarter qualifying period is supported by sufficient evidence, the claimant would not be entitled to third quarter SIBs regardless of what the hearing officer may have found for those other weeks of the third quarter qualifying period. Accordingly, we affirm the hearing officer’s determination that the claimant is not entitled to SIBs for the third quarter, March 9 through June 7, 2016.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO , PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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K. Eugene Kraft  
Appeals Judge

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Margaret L. Turner  
Appeals Judge